STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 11, 2011
v DUANE AARON SAIN, Defendant-Appellant.	No. 297268 Wayne Circuit Court LC No. 09-024170-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v MARK DEWITT YANCEY, Defendant-Appellant.	No. 297815 Wayne Circuit Court LC No. 09-024170-FC

Before: CAVANAGH, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

In Docket No. 297268, defendant, Duane Aaron Sain, appeals as of right his jury trial conviction of first-degree murder, MCL 750.316. Sain was sentenced to life in prison without parole. We affirm.

In Docket No. 297815, defendant, Mark Dewitt Yancey, appeals as of right his jury trial convictions of first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Yancey was sentenced to life in

prison without parole for the first-degree murder conviction and two years in prison for the felony-firearm conviction. We affirm.[1]

I. COMMON ISSUES[2]

A. HEARSAY AND IMPEACHMENT

Defendants first argue that the trial court improperly admitted hearsay evidence for purposes of impeachment. We disagree.

This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007). Preliminary questions of law are reviewed de novo. *Id.* A court abuses its discretion when it selects a course outside the range of principled outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). Nevertheless, an erroneous evidentiary ruling does not require reversal unless it "affirmatively appears that it is more probable than not that the error was outcome determinative." *People v Moorer*, 262 Mich App 64, 74; 683 NW2d 736 (2004).

The officer in charge of this case, Detroit Police Sergeant Gary Diaz, testified at trial regarding out-of-court statements made to him by one of the prosecutor's primary eyewitness, Daniel Hines. Defendants objected to the admission of the testimony on the ground that it was hearsay. The trial court admitted it only for purposes of impeaching some of Hines's testimony and instructed the jury to only consider it for that purpose. Defendants argue that, because the statement does not fall under any hearsay exception, it should not have been admitted.

Defendants' argument is misguided. Hearsay is defined as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Thus, a statement that is *not* offered to prove the truth of the matter asserted is, by definition, *not* hearsay. Because the admitted statement was offered for impeachment purposes only, and not offered to prove the truth of the matter asserted, it was not hearsay. Thus, the rules prohibiting the admission of hearsay, MRE 802, and allowing certain hearsay exceptions, MRE 803, are not applicable.

B. PROSECUTORIAL MISCONDUCT

Defendants first argue that they are entitled to a new trial because the prosecutor improperly appealed to the jurors' sympathy in her opening statement and questioning. We disagree.

"A prosecutor may not appeal to the jury to sympathize with the victim." *People v Unger*, 278 Mich App 210, 237; 749 NW2d 272 (2008). Here, defendants allege that some of

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[1] This Court consolidated defendants' appeals on May 5, 2010. *People v Sain*, unpublished order of the Court of Appeals, entered May 5, 2010 (Docket No. 297268).

[2] Three of defendants' issues are identical and will be analyzed together.

the prosecutor's comments were made with the sole purpose of impermissibly generating sympathy for the victim. During opening statements, the prosecutor said, "Brandon Williams [the victim] was a good kid who will never realize his dream of becoming a music producer. He died as a result of senseless violence." Then later, the prosecutor asked Williams's mother, "Can you tell the jury a little bit about [Williams]?" She responded, "He was a good person. He was very family-oriented. He was loved by everyone. . . . And he have [sic] a daughter that he was—their relationship was just beautiful." No objections were made to these statements; thus, any error is reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). In other words, reversal is necessary only if a timely instruction would have been inadequate to cure any defect. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

This statement and testimony are not strictly relevant to any material fact in this case, including the prosecutor's theory of the case or any defenses raised by defendants. Williams's character or goals are not relevant to this case. Further, it is clear that the statement and testimony have the quality of generating sympathy for Williams or his family because of his death. However, the test is whether these statements deprived defendant of "a fair and impartial trial." *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003). The statement and testimony were brief and isolated and consisted merely of drawing a very limited background picture of the victim, which did not deprive defendants of a fair trial. *Cf. Unger*, 278 Mich App at 237 (statement by prosecutor that victim was being "re-victimized" was improper but did not require reversal). Moreover, because a curative instruction would have cured any defect, defendants cannot prevail on this unpreserved issue. See *id.*

Defendants next argue that the prosecutor committed misconduct when she vouched for the credibility of Michael Porter and Sergeant Diaz. We disagree. Defendants did object to these statements at the trial court, thereby preserving the issue. Preserved issues of prosecutorial misconduct are reviewed de novo to determine whether the defendant was denied a fair and impartial trial. *People v Akins*, 259 Mich App 545, 562; 675 NW2d 863 (2003).

It is well established that a prosecutor may not vouch for the credibility of witnesses by implying she has some special knowledge of the witnesses' truthfulness. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Nor can a prosecutor place the prestige of her office behind the testimony of witnesses. *People v McGhee*, 268 Mich App 600, 633; 709 NW2d 595 (2005). However, a prosecutor can argue that a witness is credible, especially when "the question of guilt depends on which witnesses the jury believes." *Thomas*, 260 Mich App at 455.

There are three instances during the prosecutor's closing arguments that the defendants claim qualify as impermissible vouching. First, the prosecutor stated, "What reason does [Porter] have to lie?" Here, the prosecutor was not implying that she had some special knowledge that the jury was not aware of, nor did this comment place the prestige of the prosecutor's office behind the witness's testimony. This is not an argument that the prosecutor *knows* Porter is not lying, but simply an invitation to the jury to assess what motivation Porter would have to lie. Thus, this prosecutor comment during closing argument was not improper.

Next, defendants take issue with the prosecutor stating that Sergeant Diaz's "purpose is to state the truth." The entire context of the statement is as follows:

> Counsel wants you to believe that Sergeant Diaz had it in for either Mr. Sain or both of these defendant's [sic]. If Sergeant Diaz had it in for anyone[,] why further investigate?
>
> Why except he gets a statement from Mr. Porter in June. Why hunt down Mr. Hines? Why take a statement from Collin Yancey, Marcus Esters and Marcus Jackson?
>
> Why take a statement from those people if he's got it out for [the defendants]? Sergeant Diaz['s] purpose is to state the truth.

This final sentence is a more questionable statement.[3] While the statement was in direct response to defense counsel's allegation that Sergeant Diaz had a subjective notion of defendants' guilt, this does not appear to be an argument from evidence. But there was an objection, and the trial court immediately instructed the jurors to "make up their own decision regarding the credibility of each witness."[4] Because the statement lacked any continuity with the rest of the comments and because the jurors were properly cautioned about the comment, it would have been difficult for jurors to give much credence to it. Thus, there was no danger that defendants were denied a fair and impartial trial by this peculiar and brief comment.

Finally, defendants point to the following comments made during the prosecutor's rebuttal argument as being impermissible:

> But what Sergeant Diaz did do[—]and he told you he has[—]he took statements from six or seven people who say that was Duane Sain's car.
>
> Counsel wants you to ignore it and say six, seven, eight, ten people[—]so what[?] How many people does it need to be? Those people have no reason to lie on this defendant.

This argument was in direct response to defense counsel suggesting that Sergeant Diaz's reliance on the mere statements of others, as the basis to identify Sain as the vehicle's owner, is suspect and should not be given much weight by the jury. Like the prosecutor's comments earlier, this

[3] We note that the prosecutor saying that Sergeant Diaz has a purpose to "state" the truth is disjointed with the prosecutor's preceding statements. Perhaps, the prosecutor meant to say that Sergeant Diaz had a purpose to "seek" the truth by continuing his investigation or there was a transcription error. Regardless, we will analyze the statement as it appears in the transcript.

[4] Additionally, after closing arguments, the trial court instructed the jurors that any comments by the attorneys were not to be considered as evidence and should only be accepted if they were supported by the evidence or by common sense.

comment was an invitation to the jury to assess what motivation these witnesses[5] would have to lie. Thus, because this comment did not involve improper vouching, it was permissible.

C. VERDICT FORMS

Defendants next argue that their right to due process was denied by the use of flawed verdict forms submitted to their juries. We disagree. Since defendants never objected to the verdict form, we review this unpreserved issue for plain error affecting substantial rights. *Carines*, 460 Mich at 763.

The verdict form in the present case is similar to the one used in *People v Wade*, 283 Mich App 462; 771 NW2d 447 (2009). Here, the verdict form for count 1 allowed for a return of (a) not guilty of first-degree murder, (b) guilty of first-degree murder, or, on the lesser-included offense, (c) guilty of second-degree murder.

In *Wade*, this Court ordered a new trial where there was no opportunity to return a general not guilty verdict *and* the jury convicted the defendant of a lesser-included offense. *Id.* at 465-468. That case is factually distinguishable because the juries in this case convicted defendants of the highest offense, first-degree murder, for which there was an option to check guilty *or* not guilty on the verdict form. Thus, because the jurors found that the elements of first-degree murder were met beyond a reasonable doubt, the fact that there were some errors related to the lesser-included charges is of no consequence. As a result, while it was erroneous for the verdict form not to allow for a general verdict of not guilty, this error did not affect defendants' substantial rights because the crime they were convicted of *did* allow for a return of not guilty. Accordingly, defendants cannot prevail on their plain-error claim.

II. DEFENDANT SAIN'S ISSUE

Sain argues that there was insufficient evidence to support his conviction of first-degree murder on a theory of aiding and abetting. We disagree.

A challenge to the sufficiency of the evidence is reviewed de novo and in a light most favorable to the prosecution to determine "whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). Further, this Court must defer to the fact-finder's role in determining the weight of the evidence and the credibility of the witnesses. *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004). "[C]onflicts in the evidence must be resolved in favor of the prosecution." *Id.* "Circumstantial evidence and reasonable

[5] We note that these "witnesses" never testified. They, for the most part, were nameless entities. Sergeant Diaz explained that he determined that Sain was the owner of the vehicle as a result of talking to Hines and Porter as well as these "witnesses" during the course of his investigation. It is important to note that there was no objection to the introduction of this information; in fact, Sain's counsel was the one that elicited this information from Sergeant Diaz on cross-examination.

inferences arising from [the] evidence can constitute proof of the elements of the crime." *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

The elements of first-degree murder are (1) the intentional killing of a human, (2) with premeditation and deliberation. MCL 750.316(1)(a); *People v Taylor*, 275 Mich App 177, 179; 737 NW2d 790 (2007). A defendant may be vicariously liable for murder on a theory of aiding and abetting. *People v Usher*, 196 Mich App 228, 232-233; 492 NW2d 786 (1992), overruled on other grounds *People v Perry*, 460 Mich 55; 594 NW2d 477 (1999). Sain argues that there was insufficient evidence to prove premeditation and deliberation in this case.

Premeditation and deliberation require sufficient time to allow the defendant to reconsider his actions, or in other words, sufficient time to "take a second look." *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999). "Premeditation and deliberation may be inferred from the circumstances, and minimal circumstantial evidence is sufficient to prove an actor's state of mind." *People v Lewis (On Remand)*, 287 Mich App 356, 365; 788 NW2d 461 (2010). Two eyewitnesses testified that defendants were part of a group that got into an argument with Williams during the day on May 20, 2009. Later that night, when it was dark outside, Porter saw a car, driven by Sain, approach slowly before the passenger fired a gun out of the window. Hines testified that the car also had its headlights off. At the time of the shooting, Porter heard someone yell "black point," which he identified as a reference to the "gang" associated with defendants' neighborhood. Viewing this evidence in a light most favorable to the prosecution shows that there was sufficient evidence for a jury to conclude beyond a reasonable doubt that the shooting was premeditated and deliberate.

Sain also argues that there was insufficient evidence with respect to aiding and abetting. The elements of aiding and abetting are:

> (1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement. [*People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006).]

Sain maintains that there was insufficient evidence to show that he was willfully at the scene or that he did not attempt to stop Yancey from shooting Williams. As noted above, two witnesses testified that the car drove deliberately toward a group of four individuals. Porter specifically testified that Sain was driving the car. This is evidence that Sain was deliberately aiding the shooter. It is difficult to understand how Sain would not be willfully at the scene if he was driving the vehicle that brought them to the scene. Moreover, the prosecutor is not required to prove a negative—that Sain did *not* try to stop Yancey. *People v Hardiman*, 466 Mich 417, 424; 646 NW2d 158 (2002). As a result, Sain's argument with respect to aiding and abetting is meritless.

Sain also argues that there was insufficient evidence to demonstrate that he was even present at the shooting or that his car was involved in the shooting. As noted above, Porter specifically testified that he saw Sain at the scene. Sain presented no alibi or other evidence of

his location. Another witness testified that he saw what he considered to be Sain's car at the scene. Thus, there was considerable evidence from which the jury reasonably could conclude that Sain was present at the shooting. Therefore, when viewing all of the evidence in a light most favorable to the prosecution, there was sufficient evidence from which a rational trier of fact could conclude that Sain was guilty of first-degree murder.

III. DEFENDANT YANCEY'S ISSUES

A. DUE PROCESS

Yancey first argues that the photographic lineup presented to Porter was unduly suggestive, which denied him his right to due process. We disagree.

A trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id.*

Due process protects defendants "against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures." *People v Hickman*, 470 Mich 602, 607; 684 NW2d 267 (2004), citing *Moore v Illinois*, 434 US 220, 227; 98 S Ct 458; 54 L Ed 2d 424 (1977). In order for an allegedly suggestive lineup to amount to a successful due process challenge, "a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *Kurylczyk*, 443 Mich at 302.

Defendant maintains that the array was unnecessarily suggestive because it depicted individuals from the neighborhood, who he asserts were witnesses to the shooting and may have been on the prosecutor's potential witness list. While the veracity of this assertion is not known, it also is not dispositive. What is important, however, is whether the composition of the array led to "a substantial likelihood of misidentification." Here, Porter testified, outside the presence of the jury, that he did not recognize any of the people in the photo array except for Yancey. Given that the witness was unaware of who the other people were and their potential involvement with the case, it is clear that the array cannot be considered unnecessarily suggestive.

Yancey next argues that the lineup violated his right to due process[6] because he did not have an attorney present at the photographic lineup. We disagree. Yancey never objected to the identification on this basis. Thus, this unpreserved constitutional issue is reviewed for plain error affecting substantial rights. *Carines*, 460 Mich at 763.

Yancey's reliance on *People v Anderson*, 389 Mich 155; 205 NW2d 461 (1973), overruled in part *Hickman*, 470 Mich 602, is misplaced. In *Anderson*, our Supreme Court held that an accused has the right to counsel at a photographic lineup if the accused is *in custody* at

[6] We note that this issue is more accurately framed as an alleged violation of the right to counsel.

the time. *Anderson*, 389 Mich at 186-187; see also *Kurylczyk*, 443 Mich at 302. However, the Supreme Court later limited this right to counsel to apply only *after the initiation of adversarial criminal proceedings*. *Hickman*, 470 Mich at 603-604. The *Hickman* Court explained that *Anderson's* expansion of the right to counsel before the initiation of adversarial criminal proceedings was not grounded in either the federal constitution or state constitution. *Id.* at 605-606. Therefore, the rule established in *Anderson* was expressly repudiated. Since Yancey was not charged with a crime until almost two months after the photographic lineup, he cannot prevail on this issue.

We note that, aside from *Anderson*, there are other pre-*Hickman* cases that stand for the proposition that "[i]n the case of photographic identifications, the right of counsel attaches with custody." E.g., *Kurylczyk*, 443 Mich at 289; *People v McCray*, 245 Mich App 631, 639; 630 NW2d 633 (2001). However, even though these have not been expressly overruled, an analysis shows that the case law used in support of these cases can be traced back to *Anderson*. See *Kurylczyk*, 443 Mich at 297-298 (citing *Anderson*); *McCray*, 245 Mich App at 639 (citing *Kurylczyk*). Accordingly, Yancey's position, that his right to counsel at the photographic lineup attached because he was in custody, is not supported by these cases either.

B. SUFFICIENCY OF THE EVIDENCE

Finally, Yancey argues that there was insufficient evidence to support his conviction for first-degree murder. We disagree.

Similar to Sain, Yancey argues that there is insufficient evidence to prove the elements of identity and premeditation. But the evidence against Yancey was identical to that against Sain, except that Porter identified Yancey as the shooter, and two witnesses saw Yancey at the altercation earlier in the day. Thus, there was sufficient evidence presented from which a rational trier of fact could conclude beyond a reasonable doubt that Yancey was the shooter. Because there was also sufficient evidence of premeditation, as discussed above, there is no basis to Yancey's argument on this issue.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder
/s/ Donald S. Owens